IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1609

TERRY T. TORRES,

Appellant,

—v.—

COMMONWEALTH OF PUERTO RICO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

BRUCE J. ENNIS
CHARLES S. SIMS
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

Attorneys for Amicus Curiae

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INTEREST OF AMICUS[1/]

The American Civil Liberties Union is a nation-wide, non-partisan organization of over 200,000 members, dedicated solely to defending the principles of freedom and democracy embodied in the Bill of Rights.

1/ Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

Central to those freedoms is the right to be free from unreasonable government searches and seizures protected by the Fourth Amendment. That Amendment erects a critical barrier between the government and the citizen, and it defines the procedures and standards which the government must follow whenever it seeks to invade "the right of the people to be secure in their persons, houses, papers, and effects . . . ."

The ACLU has repeatedly urged upon this Court a "strict construction" of that Amendment. Puerto Rico has now, by statute, removed from the protections of the Fourth Amendment the privacy of the nearly 2,000,000 persons who annually enter Puerto Rico from the mainland United States. 2/ It is the purpose of this amicus brief to show that this statute is inconsistent with the Fourth Amendment.

2/ See Commonwealth of Puerto Rico Tourism Company, Tourism Industry of Puerto Rico, Selected Statistics (1978).

STATEMENT OF THE CASE

This case involves the warrantless search of luggage belonging to a United States citizen arriving in Puerto Rico on a non-stop flight from the mainland United States. The search consisted of a thorough rummaging through the contents of appellant's suitcase in the baggage claim area of the San Juan airport. It was conducted over appellant's clearly articulated objection and, as both the courts below have held, without probable cause or reasonable ground to suspect that a crime had been committed. The baggage searched contained approximately one ounce of marijuana. The search led directly to appellant's arrest and conviction.

Only seven of the eight justices who compose the Supreme Court of the Commonwealth of Puerto Rico participated in appellant's appeal to that court. Four of the seven found the Puerto Rican statute authorizing random, indiscriminate searches of personal belongings entering Puerto Rico from the United States to be a clear

violation of the Fourth Amendment. Their majority opinion specifically rejected the contention that the warrantless search of appellant's suitcase was permissible under this Court's "border search" exception to the Fourth Amendment, and ruled that the Puerto Rican legislature had not enacted the statute authorizing the search with the intention of furthering the Commonwealth's power to conduct reasonable administrative inspections in the interest of public health and safety. However, the four-man majority was prevented from reversing appellant's conviction by Article 5, § 4 of the Constitution of Puerto Rico, which empowers the Supreme Court of Puerto Rico to declare Commonwealth laws unconstitutional only by a majority vote of all the justices who compose the court, that is, by a vote of at least five justices.

The majority opinion of the court below concluded, "The judgment appealed should be reversed and the appellant acquitted." Juris. Stat. App. A, at 30. But the judgment entered by the Chief Clerk of that Court declared "[T]he judgment appealed is affirmed." Juris. Stat. App. B, at 100.

SUMMARY OF ARGUMENT

The Fourth Amendment creates a justifiable expectation of privacy in the contents of a closed suitcase a person has in his possession. United States v. Chadwick, 433 U.S. 1 (1977). In the absence of exigent circumstances, or one of the other "jealously and carefully drawn" exceptions to the Fourth Amendment's warrant requirement, any warrantless search is per se unreasonable, and the fruits of that search are inadmissible in court. Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); see also Mapp v. Ohio, 367 U.S. 643 (1960). The boundary between the mainland United States and Puerto Rico is not an international border, or a "functional equivalent" thereof, justifying invocation of the "border search" exception to the Fourth Amendment. Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973). Nor would the "border search" exception itself, even if it applied, permit the extended, wholly discretionary intrusion which took place in this case without a showing of reasonable suspicion or probable

cause. Almeida-Sanchez v. United States, supra. Moreover, the statute authorizing the search has been authoritatively construed by Puerto Rico's highest court as not being an exercise of the power to conduct reasonable administrative inspections to protect public health and safety, a construction which binds this Court unless it is "inescapably wrong." Fornaris v. Ridge Tool Co., 400 U.S. 41, 43 (1970)(per curiam). And even if the statute had been enacted to protect public health or safety, this search would still be unconstitutional because it was conducted without a warrant and pursuant to no "specific neutral criteria" serving to assure equitable application. Marshall v. Barlow's, Inc., ___ U.S. ___, 56 L.Ed.2d 305, 318 (1978).

In addition, state courts have an unqualified obligation to enforce federal constitutional rights. U.S. Const. Article VI, cl. 2; see also Testa v. Katt, 330 U.S. 386 (1947). The provision of the Constitution of Puerto Rico which prevented the majority of the justices who heard appellant's case from entering an order reversing his conviction, despite their ruling that the conviction violated his federal

constitutional rights, contravenes that obligation. Moreover, as applied to this case,3/ it denies the appellant equal protection of the laws. Article V, § 4 of the Constitution of Puerto Rico arbitrarily and capriciously disadvantages appellant, compared with other petitioners in the Supreme Court of Puerto Rico raising identical legal claims, by penalizing him because all eight justices did not participate in his case. It also unfairly discriminates against him, compared with other persons convicted of the identical crime, because the basis of his appeal was a particular constitutional claim, which requires five votes to prevail, rather than an evidentiary or other claim, which requires only a majority of those sitting to prevail.

Finally, the provision violates due process by unfairly shifting the burden of persuasion on appeal. Puerto

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3/ The distinction between facial unconstitutionality and unconstitutionality as applied is somewhat artificial in this case. Article V, § 4 is only operative when fewer than all eight justices participate in a given case. If all eight justices are sitting, ancient common law principles of majority rule govern their decisions. See FTC v. Flothill Products, Inc., 389 U.S. 179 (1967).

Rican law permits final decisions in criminal cases involving the constitutionality of state statutes to be rendered by a three-judge panel of the Commonwealth's Supreme Court, see, e.g., People v. Perez, 83 P.R.R. 518 (1961). But when fewer than five justices sit, under Article V,§ 4 it becomes mathematically impossible for an appellant challenging the constitutionality of a Puerto Rican statute to prevail. Similarly, it becomes impossible for a prosecutor in such a case to lose.

In light of this Court's recent curtailment of the right to federal collateral attack of a state conviction on Fourth Amendment grounds, this procedure is especially troublesome when a defendant seeks to present a Fourth Amendment issue in a direct state court appeal. Stone v. Powell, 428 U.S. 465 (1976). The same notions of equal institutional competence as between state and federal courts which supported the result in Stone v. Powell, supra, require the Court to set aside this state rule. For this case challenges Stone v. Powell's most basic premise: the majority of the court below, acting fully in accordance with state law, was required

to affirm a conviction which this Court, acting under federal law and the Constitution, is required to reverse. There simply cannot be room in our federalism for such a right-denying anomaly.4/

4/ Although amicus urges the Court to set Art. V, § 4 of the Constitution of Puerto Rico aside as unconstitutional, there are also less drastic remedial alternatives open to the Court. For example, the Court might remand the case to the Supreme Court of Puerto Rico so that the state court might fashion in its own remedies. Two possibilities upon remand would be entry of an order reversing appellant's conviction, but lacking in precedential effect, and/or a new court rule requiring automatic rehearing before the entire court within a set period of time whenever the situation presented here arises, in the absence of which an order reversing the conviction shall be entered. The Court may also wish to order, as it has done before, Dowd v. United States Ex Rel. Lawrence Cook, 340 U.S. 206 (1951), that appellant be given a new, out-of-time hearing before the entire Supreme Court of Puerto Rico.

ARGUMENT

I. THE WARRANTLESS SEARCH AND SEIZURE OF PERSONAL LUGGAGE IN APPELLANT'S POSSESSION WAS CONDUCTED WITHOUT PROBABLE CAUSE, IN THE ABSENCE OF EXIGENT CIRCUMSTANCES, AND IN DIRECT VIOLATION OF APPELLANT'S FOURTH AMENDMENT RIGHTS.

The Fourth Amendment's mandate is clear and unambiguous:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In determining the Fourth Amendment's applicability to a particular governmental intrusion, the only question is whether the person searched had "a reasonable expectation of privacy" in the place or item searched. Katz v. United States, 389 U.S. 342, 360 (1967)(Harlan, J. concurring). An owner does have a reasonable expectation of privacy with respect to securely closed personal luggage in his possession. United States v. Chadwick, supra.

Thus, the only issue before the Court is whether this warrantless search may be justified by some special circumstance. However, as this Court has repeatedly warned:

> [T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be a 'showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'
> Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971)(citations omitted).

Puerto Rico has not met that high burden.

First, the Puerto Rican statute authorizing the search does not require or even mention probable cause. It subjects "the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States" to highly intrusive and indiscriminate police "inspections" without requiring any suspicion of crim-

inal activity whatever. P.R. Laws Ann. tit. 25, § 1051.[5/] This Court has held that in the absence of probable cause, any police intrusion on an individual's privacy must be limited to that which is necessary to protect the officer's personal safety, and that even such a limited frisk may be conducted only after an officer has reason to suspect that the person he

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5/ P.R. Laws Ann. tit. 25, § 1051 provides:

> The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain, question, and search those persons whom the Police have ground to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances.

The courts below construed this section as establishing two different standards, one for searching luggage and one for "detaining, questioning, and searching" persons. Only the first clause is relevant here. Insofar as the latter clause authorizes a full-blown "search" on less than probable cause, it is also clearly unconstitutional under Terry v. Ohio, supra.

has detained is dangerous or armed. Terry v. Ohio, supra; see also Chimel v. California, 395 U.S. 752 (1969)(search incident to arrest limited to places where the prisoner might immediately reach to obtain a weapon).

Second, the trial judge specifically held, and all seven justices of the Puerto Rican Supreme Court sitting on the case agreed, that there was no probable cause for this search. The fact that the officers on the scene did not attempt to frisk appellant, together with his calm request to telephone a lawyer, only confirms that he was considered neither dangerous nor likely to flee the scene. In short, the courts below were entirely correct in holding that this search -- and with it appellant's conviction -- must stand or fall on the constitutionality of the completely indiscriminate, highly intrusive, and wholly discretionary police practice authorized by P.R. Laws Ann. tit. 25, § 1051.[6/]

6/ The Commonwealth has never contended that the Fourth Amendment is inapplicable in Puerto Rico, and the Puerto Rican courts involved in this case have assumed

(Footnote 6 continued on next page)

In its Motion to Dismiss or Affirm submitted to this Court, the Commonwealth

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(Footnote 6 continued)
that it applies. See also People v. Caballero, 100 P.R.R. 146 (1971). Although this Court has never definitively ruled that the Fourth Amendment applies to Puerto Rico, see, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668 n. 5 (1974), it has held that the general protections of due process do apply there, through either the Fifth or the Fourteenth Amendments. Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 599-600 (1976). Relying upon the Court's statements in Calero-Toledo, and Examining Bd., both supra, as well as their own long experience in dealing with the intricacies of Puerto Rico-United States legal relations, the lower federal courts within whose jurisdiction Puerto Rico lies have consistently held that full Fourth Amendment protections are in effect there. Cf. United States v. Villarin-Gerena, 553 F.2d 723 (1st Cir. 1977); United States v. Meyer, 536 F.2d 963 (1st Cir. 1976); United States v. Diaz, 535 F.2d 130 (1st Cir. 1976); Amesquita v. Hernandez-Colon, 518 F.2d 8 (1st Cir. 1975), cert. denied, 424 U.S. 916 (1976). Application of the Fourth Amendment does not disrupt the Commonwealth's internal affairs because the protections against unreasonable searches and seizures included in the Constitution of Puerto Rico are more stringent than those contained in the Fourth Amendment. See Article 1, § 4 of the Constitution of Puerto Rico (wiretapping unconstitutional; exclusionary rule made a constitutional principle).

suggested two justifications for the procedure authorized by P.R. Laws Ann. tit. 25, § 1051: (1) it represents a legitimate exercise of the Commonwealth's power to patrol its "border" with the United States, and (2) it is a legitimate exercise of the Commonwealth's power to conduct reasonable inspections to protect public health and safety. Both justifications were rejected by the majority of the Supreme Court of Puerto Rico, and neither withstands analysis.7/

7/ Several other arguments suggested by the Commonwealth may be disposed of summarily. First, the contention that Puerto Rico is entitled to evade the clear commands of the Fourth Amendment because it is an island is frivolous on its face. The applicability of the Fourth Amendment is a matter of law, not geography. By the Commonwealth's reasoning, the Fourth Amendment would have to be held inapplicable to Manhattan, Long Island, Martha's Vineyard, Nantucket, Hilton Head, and Key Biscayne, as well as parts of Maine, Alaska, and California, and the entire state of Hawaii. Second, the notion that appellant may be deemed to have consented to the search because warnings concerning the existence of P.R. Laws Ann. tit. 25, § 1051 were posted in San Juan airport is equally frivolous. The trial court found that no such warnings were posted on the airplane on which appellant arrived or at
(Footnote 7 continued on next page)

The Commonwealth's argument that the boundary between Puerto Rico and the United States constitutes the "functional equivalent" of an international border fundamentally misconstrues the Court's holding in Almeida-Sanchez v. United States, supra, at 272. The Commonwealth argues that its special status requires that it be recognized as a semi-independent, semi-sovereign nation with power to suspend constitutional rights. But Almeida-Sanchez, supra, was not concerned with degrees of sovereignty. It was concerned with the different Fourth Amendment standards that might be applicable at different distances from true international borders. This Court's holding with regard to the right of the Post Office to inspect incoming foreign mail

(Footnote 7 continued)
the mainland airport from which he departed on his non-stop flight. Moreover, even if the warnings in San Juan airport had convinced appellant that he should leave the island immediately in order to avoid consenting to a search, he still would have had to claim his luggage before getting another flight out. Indeed, for all the record shows, that is precisely what he was going to do. Finally, the regrettable fact that Puerto Rico is currently experiencing a serious crime problem is simply irrelevant to determining the scope of the protections afforded by the Fourth Amendment, see Almeida-Sanchez v. United States, supra, at 273.

confirms this analysis of Almeida-Sanchez, supra. See United States v. Ramsey, 431 U.S. 606 (1977).[8]

In fact, the "border search" cases, when properly understood, directly undermine the Commonwealth's arguments. The "border search" cases as a whole make clear that borders between sovereign countries are unique facts of international life, representing the precise point in space where American conceptions of freedom become jurisdictionally functional. On one side of the border, the American constitution applies. On the other side of the border, in the absence of official American government action,[9] it does not.

8/ The procedures followed by U.S. Customs Service officers at airports which serve both domestic and international travellers further illustrate the point. Even within the same airport (at New York's Kennedy Airport, for example) only persons entering the United States from foreign countries are subjected to Customs inspections. And as the majority of the Puerto Rican Supreme Court observed, "[W]hen traveling by plane there is no difference between going from here to Miami or from Miama [sic] to New York." Juris. Stat., App. A, at 21.

9/ See Reid v. Covert, 354 U.S. 1 (1957). Indeed, the holding in Reid, that American freedoms may sometimes be extended
(Footnote 9 continued on next page)

The relationship between the United States and Puerto Rico is not comparable to the relationship between the United States and a truly sovereign nation. With a few limited exceptions, see, e.g., Califano v. Torres, 435 U.S. 1 (1978), all American legal principles are as fully operative in Puerto Rico as in any of the fifty states. See Examining Bd., supra, and Calero-Toledo, supra.

Finally, the search authorized by P.R. Laws Ann. tit. 25, §1051 fails to meet the standards this Court has established for searches at true international borders. Although it has approved warrantless "stops for brief questioning" at fixed checkpoints at or near international borders, United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976), the Court has specifically held that "'any further detention . . . must be based on consent or probable cause.'" United States v. Martinez-Fuerte, supra at 567, quoting, United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975). A "roving patrol" near a

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(Footnote 9 continued)
extraterritorially, only emphasizes that they may not be compromised where American jurisdiction is unquestionable.

border must be able to point to "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" in order to conduct even a "modest" questioning stop. United States v. Brignoni-Ponce, supra, at 880-84. And in Almeida-Sanchez v. United States, supra, the Court ruled that roving border patrols are not excepted from the Fourth Amendment and are not permitted to conduct searches on the basis of their own "unfettered discretion." Almeida-Sanchez v. United States, supra, at 270.

But tit. 25, § 1051 of P.R. Laws Ann. establishes no fixed checkpoints, requires no finding of suspicion or probable cause, and authorizes highly intrusive searches by roving officers without requiring an initial stop for questioning. In the course of making its "intermediate border" argument, the Commonwealth concedes that the boundary between the United States and Puerto Rico is something less than an international border. Motion to Dismiss or Affirm, at 24. If this is so, then even by the Commonwealth's own argument a higher, rather than a lower, degree

of Fourth Amendment protection should be accorded persons entering Puerto Rico from the United States mainland than is accorded persons crossing an international boundary. The problem with the Commonwealth's argument is that P.R. Laws Ann. tit. 25, § 1051 does precisely the reverse.

The Commonwealth's claim that P.R. Laws Ann. tit. 25, § 1051 may be upheld as a proper exercise of its power to make reasonable administrative inspections in the interest of public health and safety is equally unpersuasive. First, the court below has authoritatively ruled that the challenged statute was enacted not for the purpose of protecting health or safety, but as a means of enforcing the Commonwealth's criminal laws. See Juris. Stat., App. A, at 13. This Court has ruled that it will not set aside the construction of a Puerto Rican statute by the Puerto Rico Supreme Court unless that construction is "inescapably wrong." Fornaris v. Ridge Tool Co., supra. Considering that the Statement of Motives of the Puerto Rican legislature which accompanied passage of this statute, quoted in Juris. Stat., App. A, at 40-41, explicitly states the legislature's concern with the Commonwealth's

growing crime problem, and that the statute is enforced by regular police officers, not administrative officials, no such showing can be made here. Moreover, even if the Commonwealth's health and safety inspection power could be invoked, P.R. Laws Ann. tit. 25, § 1051 would still be unconstitutional because it does not require a warrant or establish the "specific neutral criteria" on the basis of which an administrative search warrant must be issued. See Marshall v. Barlow's, Inc., supra, at 318; see also Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967). 10/

10/ The military search cases cited by the Commonwealth also do not help its case. Although this Court has traditionally accorded the military considerable discretion to fashion its own criminal rules and procedures, see Parker v. Levy, 417 U.S. 733, 744 (1974), the U.S. Court of Military Appeals has repeatedly made clear its intention to require the strictest possible application of the Fourth Amendment to searches and seizures conducted pursuant to military authority. See, e.g., Courtney v. Williams, 24 U.S.C.M.A. 87, 89-90; 51 C.M.R. 261, 262-263, 1 M.J. 267, 270 (CMA 1976) ("The burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule . . . . We believe that those procedures required by the Fourth Amendment in the civilian

(Footnote 10 continued on next page)

The only arguably analogous instance in which warrantless inspections are currently permitted, namely anti-skyjacking screenings at airport departure gates,[11] underscores the unreasonableness of the Puerto Rican procedure challenged here. Keyed to a highly specific danger of the gravest importance (the chance that firearms will be misused on a passenger airliner in mid-air), anti-skyjacking searches are conducted on the basis of articulable facts (visual screenings and individualized comparisons with the Federal Aviation Agency's scientifically developed skyjacker "profile"), and carried out in a graduated step-by-step progression from lesser to greater intrusions (from a visual screening, to an electronic magnetometer, to questioning, to physical searches).[12] In addition, warnings

(Footnote 10 continued)
community must also be required in the military community. We discern no considerations of military necessity that would require a different rule.") (citation omitted.)

11/ See United States v. Davis, 482 F.2d 893 (9th Cir. 1973).

12/ See United States v. Doran, 482 F.2d 929 (9th Cir. 1973); United States v. Lopez, 328 F. Supp., 1077 (E.D.N.Y. 1971).
(Footnote 12 continued on next page)

concerning these intrusions are posted at a point where a would-be traveller could still make a meaningful choice to submit to the procedure or to leave the airport.[13] None of these conditions applies to this case.

(Footnote 12 continued)
These anti-skyjacking cases are, moreover, unique. Where less immediate threats to innocent lives are involved, the courts have repeatedly struck down procedures similar to these. See, e.g., United States v. Craemer, 555 F.2d 594 (6th Cir. 1977) (Drug Enforcement Administration's "drug courier profile").

13/ See, e.g., United States v. Doran, supra, at 930-31.

II. ARTICLE V, SECTION 4 OF THE CONSTITUTION OF PUERTO RICO, WHICH PREVENTED THE MAJORITY OF THE JUSTICES BEFORE WHOM APPELLANT ARGUED HIS STATE COURT APPEAL FROM ENTERING AN ORDER REVERSING HIS CONVICTION DESPITE THEIR OPINION THAT THE CONVICTION WAS UNCONSTITUTIONAL, VIOLATES THE SUPREMACY CLAUSE AND ABRIDGES APPELLANT'S RIGHTS TO EQUAL PROTECTION AND DUE PROCESS.

A. The Supremacy Clause

State and federal courts have an equal duty to enforce federal constitutional rights. In Article VI of the Constitution this doctrine is set forth in unequivocal terms:

> This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (emphasis added)

In recent years this Court has repeatedly asserted the continuing vigor of this fundamental principle. See, e.g., Juidice v. Vail, 430 U.S. 327 (1977); Stone v. Powell, supra; Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Hicks v. Miranda, 422 U.S. 332 (1975); Hoffman v. Pursue,

Ltd., 420 U.S. 592 (1975).[14] Yet a "Thing in the Constitution" of Puerto Rico, namely Article V, § 4, has prevented the vindication of appellant's federal constitutional rights. It has prevented the judges of the Puerto Rican Supreme Court from being "bound" by the Fourth Amendment.[15]

14/ The extreme importance of the Supremacy Clause, as the bedrock provision upon which the entire federal system ultimately rests, was clearly recognized by the Founding Fathers. Even prior to the Constitutional Convention James Madison wrote, "If the judges in the last resort depend on the States, and are bound by their oaths to them and not to the Union, the intention of the law and interests of the Union may be defeated by the obsequiousness of the tribunals to the policy or prejudices of the States." 2 J. Madison, Writings 339. Moreover, even the harshest contemporary critic of modern "judicial activism" acknowledges the singular importance of exacting strict fidelity to the commands of the Supremacy Clause. See R. Berger, Congress v. The Supreme Court, at 223-285. (1969).

15/ It has also caused the members of the court to violate their oaths of office. Article VI, § 16 of the Puerto Rican Constitution requires that "all public officials . . . shall take an oath to support the Constitution of the United States." The oath makes no exception for the Supremacy Clause or the Fourth

(Footnote 15 continued on next page)

Relying upon the Supremacy Clause, this Court has repeatedly set aside state procedures which impeded the enforcement of constitutional rights. Long before passage of the Fourteenth Amendment, which drastically altered the balance in federal-state relations in favor of the federal government, this Court relied upon the Supremacy Clause to ensure that federal rights would be enforced by state courts. Even in the antebellum heyday of the states' rights doctrine, this Court intervened dramatically to strike down "any state law" or state judicial procedure which "interrupt[ed], limit[ed], delay[ed],

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(Footnote 15 continued)
Amendment. Commentators have long noted the intimate connection between the Supremacy Clause and the clause relating to the oath of office. See 2 J. Madison, supra. R. Berger, supra.

The ironies and anomalies presented by this situation are numerous. Perhaps the greatest of them is that the most compelling and exhaustive legal argument for reversing appellant's conviction presently before this Court is to be found in the majority opinion of the court below. In this limited respect at least, this case, like Estate of Wilson v. Aiken Indus., cert. denied, 47 U.S.L.W. 3219 (Oct. 2, 1978), also recalls the well known remark by Charles Dickens as to what the law can sometimes be. Id. at 3219 n. 3.

or postpone[d]" the assertion of a "positive and absolute" constitutional right. See Prigg v. Pennsylvania, 41 U.S. 539, 611-12 (1842)(state kidnapping statute invalidated); Ableman v. Booth, 62 U.S. 506 (1859)(state habeas corpus process invalidated). Surely the values of privacy and liberty embodied in the Fourth Amendment are as worthy of this Court's protection as the "property" interests it invoked the Supremacy Clause to defend one hundred and thirty years ago on behalf of the fugitive slave clause.

Moreover, because this Court's decision in Stone v. Powell, supra, severely restricts a state defendant's right to have an independent federal determination of a Fourth Amendment claim, the Court should exercise particular care to ensure that a state court gives every appellant a full and fair opportunity to prevail on his Fourth Amendment claim. See Mincy v. Arizona, ___ U.S. ___, 57 L.Ed.2d 290, 306 (1978) (Marshall and Brennan, J.J., concurring).16/

16/ As the concurring justices observed, "It is far from clear that we would have

The Court's decision in Stone v. Powell presupposes parity between state and federal courts as forums for enforcing federal rights. Stone v. Powell, supra,

(Footnote 16 continued)
granted certiorari solely to resolve the Fifth Amendment issue in this case, for that could have been resolved on federal habeas corpus. With regard to the Fourth Amendment issue, however, we had little choice but to grant review, because our decision in Stone v. Powell precludes federal habeas consideration of such issues." Mincy v. Arizona, supra, at 306. Indeed, in the aftermath of Stone, at least one circuit court has suggested that a state defendant has a right to "meaningful appellate review" of his Fourth Amendment claim. See O'Berry v. Wainwright, 546 F.2d 1204, 1213 (5th Cir.) 1976), cert. denied, 433 U.S. 911 (1977). See also, Gates v. Henderson, 568 F.2d 830, 843-4 (2d Cir. 1977), cert. denied, 98 S. Ct. 775 (1978)(Oakes, J. concurring). The net effect of Article V, § 4 and similar state provisions could well be a substantial increase in the number of Fourth Amendment cases this Court is required by law to adjudicate on the merits. See 28 U.S.C. §§ 1257(1), (2), 1258(1), (2).

at 493, n. 35. But Article V, § 4 of the Constitution of Puerto Rico operates as a direct and special presumption against the successful assertion of constitutional claims in a direct criminal appeal. When a rule of state appellate procedure unduly burdens the presentation of a Fourth Amendment claim on direct appeal, the arguments concerning relative institutional competence which supported the result in Stone v. Powell, supra, argue just as strongly that the state court rule must be set aside.[17/] Article V, § 4 of the

17/ See also Smyth v. Ames, 169 U.S. 466 (1898)(possible availability of an adequate state court remedy should not foreclose federal court consideration of a properly presented federal issue). Should the Court decide that Art. V, § 4 *is* a state rule denying appellant an "opportunity for full and fair litigation" of his Fourth Amendment claim, see Stone v. Powell, supra, at 494, without reaching the Fourth Amendment question, amicus urges the Court to make explicit in its decision that appellant's right to federal collateral attack on his conviction is not foreclosed.

Constitution of Puerto Rico clearly and unmistakably contradicts Stone v. Powell's fundamental premise, and it cannot be harmonized with that case.

B. Equal Protection and Due Process

In addition to obstructing the enforcement of federal rights in general, Article V, § 4 specifically deprives the criminal appellant challenging the constitutionality of his conviction in the Supreme Court of Puerto Rico of equal protection and due process.

Although a state has no obligation to afford a criminal defendant an opportunity to appeal his conviction at all, once an appeal is granted it must be made available on a fair and non-discriminatory basis. See, Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963). See also Ross v. Moffitt, 417 U.S. 600 (1974). Puerto Rican law provides the criminal defendant an appeal to the Commonwealth's Supreme Court, P.R. Laws Ann. tit. 4, § 37 (Supp. 1977), but Article V, § 4 of the Puerto Rican Constitution discriminates against certain criminal defendants in

two important ways.

First, it discriminates against appellants raising federal constitutional claims in a way which serves no rational state purpose. Under the current Puerto Rican procedure which permits the Puerto Rican Supreme Court to sit in three-man panels, see People v. Perez, supra, a mass murderer may win an appeal by a vote of two Supreme Court justices by successfully arguing, for example, a hearsay point. Meanwhile, appellant must serve a substantial prison sentence for a minor drug charge because his constitutional rights were violated by an unconstitutional statute and despite a majority opinion entered by four of the court's justices stating that his conviction should be reversed. In addition, Article V, §4 also discriminates among different constitutional claims. Had this search been conducted in the absence of statutory authorization, four votes would have sufficed to reverse appellant's conviction.

Second, Article V, §4 discriminates against appellants raising identical constitutional claims by arbitrarily increasing their individual burdens of persuasion depending upon the number of justices who happen to sit on a particular day. As noted above, Article V, §4 is superfluous when all

eight justices are sitting: general common law rules would require their majority vote on a constitutional case coming before them. See FTC v. Flothill Products, Inc., supra. But when only seven of them sit on a constitutional case, Article V, §4 makes it necessary for a criminal appellant to persuade 70% of the bench before him. When six justices sit, the appellant must persuade 83%. When five are sitting, he must persuade 100%. And when fewer than five appear, as People v. Perez, supra, permits, an appellant challenging the constitutionality of a Puerto Rican statute simply cannot win. A sliding-scale standard for successful appellate review, in which the scale slides upward depending upon factors over which the appellant has no control, is an "arbitrary and capricious" procedure.18/

18/ The fundamental unfairness of the appeal below is highlighted by considering how the Supreme Court of Puerto Rico came to be composed of eight justices in December 1977. The court had previously been composed of nine justices, but the Puerto Rican legislature decided in 1975 to decrease their number to seven through gradual attrition. See P.R. Laws Ann. tit. 4, §31 (Supp. 1977). Were this same issue to be decided in the future, when the court is comprised of the seven justices now contemplated, a vote of four would be sufficient to declare the statute unconstitutional. (Footnote 18 continued)

Article V, §4's sliding scale offends fundamental fairness in other ways as well. This Court has held repeatedly that questions concerning the burden of persuasion in criminal cases are matters of constitutional dimension. See In Re Winship, 397 U.S. 358, (1970); Mullaney v. Wilbur, 421 U.S. 684

(Footnote 18 continued)
Indeed, if the non-participating eighth justice had died just before appellant's case was heard, this conviction would have been reversed.

Originally, the Puerto Rican Supreme Court was composed of only five justices. See Article V, §2 of the Constitution of Puerto Rico. Thus, the votes of only three would then have reversed appellant's conviction. This Court, after an extensive review of the relevant social science literature on small group interaction, has recently ruled that a group of six is sufficient to guarantee adequate consideration of the questions the group must decide. See Ballew v. Georgia, 435 U.S. 223 (1978); Williams v. Florida, 399 U.S. 78 (1970). Appellant's appeal was decided by a group of seven.

(1975). And, however burdens of persuasion may be distributed between the prosecution and the defense as matters of law, in every other phase of a criminal proceeding the prosecutor and the defendant are evenly matched in terms of the number of persons they must each convince to win their point. On motions, they must each convince one judge. In most jurisdictions, they must each convince twelve jurors to convict or acquit. In states with a unanimous jury rule, either can hang a jury by convincing a single juror. And in states where non-unanimous jury rules apply, either side can obtain a final judgment on the same vote-count. But under Article V, §4 of the Constitution of Puerto Rico, and People v. Perez, supra, a prosecutor can sustain a conviction on appeal without convincing a single justice that the law underlying the conviction is constitutional. A defendant whose rights have been violated must convince five that it is not. Although there may be a legitimate state interest in constructing legal presumptions in favor of the constitutionality of duly enacted state legislation,19/ it is impermissible to enforce that interest by creating judicial

19/ [Please see next page for footnote]

mechanisms that operate in a manner which is fundamentally unfair.

For many years this Court also refused to decide major constitutional questions by a vote of fewer than a majority of the entire Court. See, e.g., Briscoe v. Commonwealth Bank of Kentucky, 33 U.S. 118 (1834). But that self-imposed rule has been disregarded for some twenty-four years. See, e.g., United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533 (1944); Feldman v. United States, 322 U.S. 487 (1944), reh. denied 323 U.S. 811 (1944). More importantly, even while the "Briscoe Doctrine" was in effect, the Court made sure that no abuses such as these would arise. Briscoe itself

19/ Commonwealth v. Aguayo, 83 P.R.R. 534 (1958), suggests that the Puerto Rican Constitutional Convention was concerned with the "presumption of constitutionality," as well as the problems of non-uniformity which might arise from the court's sitting in divisions, when it framed Article V, §4. See also People v. Perez, supra. On the other hand, Article V, §4 does not on its face create any presumption favoring the integrity of lower court judgments. Under Article V, §4, a party seeking to set aside a state statute must convince five justices of the Puerto Rican Supreme Court regardless of whether he won or lost below.

made an exception for "cases of absolute necessity." Briscoe v. Commonwealth Bank of Kentucky, supra at 122. And when a decision was not "absolutely necessary," the Court's solution was simple: if the entire Court could not be assembled, a case was simply put over until it could be. See, e.g., Graff, "The Charles River Bridge Case," in Quarrels That Shaped the Constitution 62, 71 (J. Garraty ed. 1966) (case put over for six years).

Virtually every state which has a rule resembling Article 5, §4 of the Puerto Rican Constitution has also created a special procedural or remedial device to prevent the situation presently before the Court from arising.[20/] Puerto Rico has made none. When an injustice occurs, it simply allows that

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20/ See, e.g., North Dakota Constitution, Article 4, §95 (requiring the state Supreme Court's chief justice to appoint another judge, or a retired justice, to replace any justice who is unable to hear a particular case); Nebraska (local practice requirement that "Notice of Constitutional Issue" be filed in advance with the Chief Clerk of the Supreme Court so that the court will sit en banc); Colorado (informal requirement that the Supreme Court sit en banc to decide a constitutional issue).
(Footnote 20 continued)

injustice to stand. This cannot be the law.

(Footnote 20 continued)

Nor should the Court's holding in Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74 (1930) govern here. That case, decided almost half a century ago, was a civil case concerning the power of the states to organize their own political subdivisions. The Court's opinion was brief. The enormous changes in due process doctrine since 1930, combined with the fact that this is a criminal case, render Ohio ex rel. Bryant, supra, inapplicable. In addition, the people of Ohio voted ten years ago to repeal the provision of the Ohio Constitution this Court upheld in that case.

CONCLUSION

The Judgment entered below should be reversed.

Respectfully submitted,

BRUCE J. ENNIS
CHARLES S. SIMS
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

ATTORNEYS FOR
AMICUS CURIAE *

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